The Comptroller General
of the United States

Washington, D.C. 20548

Jackson

Decision

Matter of: Urban Mass Transportation Administration--Cooperative Agreement--Claim of Subcontractor

File: B-230909

Date: June 12, 1989

DIGEST

Since UMTA does not have privity of contract with the subcontractor, there is no basis upon which to pay a claim made by a subcontractor when the claim has not been made with the consent and in the name of the recipient of the cooperative agreement that entered into the subcontract.

DECISION

We have been asked by the Urban Mass Transportation Administration (UMTA) whether it may release remaining funds allotted for a cooperative agreement to an unpaid subcontractor who has what is perceived to be a legitimate claim for compensation against the recipient of the cooperative agreement. As explained below, the government may not pay the claim made by the subcontractor since it is made without the contractor's consent and is not in the contractor's name.

BACKGROUND

On September 29, 1986, the Urban Mass Transportation Administration (UMTA) entered into a cooperative agreement with the Bonding Assurance Fund, Inc. (BAF) in the amount of $300,000 to help locate disadvantaged business enterprises for a Demonstration Bonding Program. Subsequently, BAF subcontracted with Hill International, Inc. to evaluate the capabilities and qualifications of prospective contractors seeking bond guarantees. We have been informed that Hill was reluctant to enter into the subcontracting agreement with BAF and did so only because UMTA was involved.

The work done by Hill was well received by UMTA. In fact, UMTA made extensive use of the information supplied by Hill. As compensation for its services, Hill, under a contractual agreement, billed BAF $37,552. BAF has yet to pay Hill.

On May 6, 1987, UMTA exercised its option to terminate its relationship with BAF. For various reasons, UMTA decided that the purposes of the agreement could not be advanced by continuing to provide federal financial assistance to BAF. This decision was made after UMTA had paid a total of $144,988 to BAF under the terms of the cooperative agreement.

Subsequent to terminating the cooperative agreement, UMTA deobligated $100,000 of the $300,000 originally awarded BAF. Thus, there is a current unexpended balance of $55,012 [$300,000 -(144,988 + $100,000)] for any unpaid claims arising under the terminated agreement. This balance would cover the claim of Hill for $37,552.

We are uncertain of BAF's status at this point. UMTA has had difficulty communicating with BAF; yet, BAF has not filed for bankruptcy nor gone through dissolution and still appears legally to exist. UMTA has not paid BAF for the services performed by Hill, and some question exists as to whether the last bill submitted to UMTA by BAF includes an amount that will be used to pay Hill.

In addition to questions regarding BAF's status are questions concerning BAF's financial accountability. We have been informed that UMTA considers BAF's financial records unauditable in their current state and refuses to make any further payments to the corporation. Thus, even if BAF is now requesting payment for Hill, UMTA considers payment to BAF impossible due to their lack of financial accountability.

ANALYSIS

In our opinion, UMTA may not pay Hill directly for services rendered under the subcontract with BAF. Although UMTA believes that Hill rendered a valuable service for which it should be compensated, we cannot find a basis for payment since there is no evidence of privity of contract between UMTA and the subcontractor. See B-160329, November 7, 1966; Erickson Air Crane Company of Washington, Inc. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984). We think that the claim by Hill may best be resolved if BAF cooperates with the subcontractor by allowing it to pursue the claim through and in BAF's name.

In analogous cases involving government contracts, we have said that a subcontractor may bring a claim in its own name against the government if it can show that it has privity of contract. See 62 Comp. Gen. 633 (1983); Universal Aircraft Parts, Inc., B-187806, January 11, 1979, 79-1 CPD 14. There

are a number of ways to prove privity in addition to the most obvious case of an express contract which binds the two parties. We have recognized that privity of contract may be created in limited circumstances under common law theories that could make a contractor the agent of UMTA, make a subcontractor a third party beneficiary, or recognize an implied contract between the government and a subcontractor. See Universal Aircraft Parts, Inc., supra, and cases cited therein.

Of these three theories, only the implied contract theory seems to have any potential application under the facts as presented in this case. The facts indicate that Hill would not have subcontracted with BAF had it not been for the presence of UMTA. Further, UMTA received full benefit from the product supplied by Hill and has expressed the desire that Hill be compensated for its outstanding work. If such a benefit is left uncompensated, it would mark a windfall for UMTA.

However, a review of our decisions indicates that more is needed to create an implied contract than is present in this case. In B-171255, September 3, 1971, we held that even if the government is instrumental in inducing a subcontractor to perform, no implied contract is created unless the evidence indicates that the government also took steps to assume the obligation to pay. The obligation to pay remained with the prime contractor in that case. In inducing the subcontractor to perform, the government's representative merely promised to look into the subcontractor's financial concerns if it made further shipments to the prime contractor.

In B-171868, August 20, 1971, we did determine that the Defense Supply Agency assumed the obligation to pay a subcontractor when its Administrative Contracting Officer (ACO) made assurances to the subcontractor that he would take steps to see that payment would be made upon receipt of the requested supplies. To achieve this end, the ACO established a special account from which he could make payments to the subcontractor. But we determined that privity existed between the government and subcontractor only with regard to the contracts fulfilled after the assurances were made and the accounts established.

We have applied the same principles under an assistance relationship. In B-181332, December 28, 1976, the direct claim of the subcontractor of a grantee was disallowed against the Office of Economic Opportunity (OEO) because there was no "privity of contract" between the subcontractor and the government agency.

After the initial claim was disallowed, the grantee, Monmouth Community Action Program, Inc. (MCAP), authorized the subcontractor to file its claim in the name of MCAP for and on behalf of the subcontractor. MCAP admitted liability to the subcontractor "only to the extent to which the Government of the United States is determined to be liable to MCAP." Upon disposition of the issues presented, we allowed payment by OEO of all amounts claimed by the subcontractor under the grant agreement. See also, 66 Comp. Gen. 604 (1987). In light of our prior cases, the facts in the case before us do not establish the existence of privity between UMTA and Hill.

CONCLUSION

Without privity of contract, there is no legal basis for a direct claim by Hill against UMTA. Without the participation of the contractor there is no way to know whether it recognizes Hill's claim nor is it possible to evaluate any defenses it might have against the claim. Despite the apparent unfairness to Hill, the risk to the government in making direct payments to subcontractors is unacceptable unless it is able to clearly extinguish its liability to the contractor for that payment.

Milton J. Socolar

Acting Comptroller General
of the United States